required." 22 Cal. Code Regs. § 12102(n), formerly § 12201(d). There is no requirement that the Defendant "know" that the "exposure" presented a significant risk, that the Defendant "know" the "exposure" was occurring without warning, or that the Defendant "know" that an "exposure" probably would occur. FSOR for 22 CCR § 12201 at 21, February 16, 1998.

The regulations do not define the term "intentionally," which is included in the warning provision of § 25249.6 but not the discharge prohibition of § 25249.5. Health & Safety Code § 25249.10 provides several exemptions from the warning requirement of § 25249.6, including "(c) An exposure for which the person responsible can show . . . that the exposure will have no observable effect assuming exposure at one thousand (1000) times the level in question for substances known to the state to cause reproductive toxicity." The Defendant bears the burden in an enforcement action of demonstrating this "no observable effect" defense. *Id.* The Proposition 65 implementing regulations (California Code of Regulations, Title 22, Chapter 3, Article 8) provide guidance on how the no observable effect defense may be scientifically established. Under 22 Cal. Code Regs § 12801(a), this determination "shall be based on evidence and standards of comparable scientific validity to the evidence and standards which form the scientific basis for the listing of a chemical as known to the state to cause reproductive toxicity." Article 8 sets forth both general principles and a "safe harbor" approach, described in further detail in §§ 12801-21; exposure assessments performed under safe harbor methods "shall be deemed to have no observable effect" (§ 12801(b)), but determinations may be made by any method that is "scientifically valid." See Final Statement of Reasons for Article 8, at 67.

Proposition 65 allows for a private enforcement action if, 60 days after the private party gives "notice" of the alleged violation to public prosecutors, no public prosecutor has commenced and is diligently prosecuting the alleged violation. Health & Safety Code § 25249.7(d). The notice must comply with the requirements of 22 Cal. Code Regs. § 12903. For consumer products exposures, the notice must provide "sufficient specificity

to inform the recipients of the nature of the items allegedly sold in violation of the law and to distinguish those products or services from others sold or offered by the alleged violator for which no violation is alleged." 22 Cal. Code Regs. § 12903(b)(2)(D).

Proposition 65 provides for two primary remedies: civil penalties and injunctive relief. "Any person violating or threatening to violate Section 25249.5 or Section 25249.6 may be enjoined in any court of competent jurisdiction." Health & Safety Code § 25249.7(a). "Any person who has violated Section 25249.5 or Section 25249.6 shall be liable for a civil penalty not to exceed $2500 per day for each such violation in addition to any other penalty established by law. Such civil penalty may be assessed and recovered in a civil action brought in any court of competent jurisdiction." Health & Safety Code § 25249.7(b)(1).

B. The Unfair Competition Law

Business & Professions Code § 17204 allows any private person "in the public interest" to enjoin unfair, illegal, or deceptive business practices, as defined in § 17200. Such private UCL action "borrows" violations of other statutes (such as Proposition 65 or § 17500) to establish predicate "unlawful" (§ 17200) business activity. *Farmers Insurance Exchange v. Superior Court*, 2 Cal.4th 377, 383 (1992).

C. The False Advertising Law

Under Business & Professions Code § 17500, a person is liable for false advertising claim if he makes a statement that is untrue or misleading, and he knew or should have known that the statement was untrue or misleading. Liability for failure to disclose facts may be imposed under § 17500 where the Defendant has made a true statement that is "couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information ...." *Day v. AT&T Corp.*, 63 Cal.App.4th 325, 332-33 (1998); *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197, 307 (1983). The Plaintiff bears the burden of producing evidence that the challenged advertising claim is false or misleading. *National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc.*, 107 Cal.App.4th

1336, 1342 (2003). Section 17500 does not provide its own independent standing to proceed in a representative capacity, but can be the basis of a claim under § 17200.

Whether a statement is misleading turns on whether it is likely to deceive members of the public. *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197, 211 (1983), and the statement "is judged by the effect it would have on a reasonable consumer." *Lavie v. Procter & Gamble Co.*, 105 Cal.App.4th 496, 507 (2003). The reasonable consumer standard requires a Plaintiff to show not only that the statements "could mislead the public, but that they were likely to mislead the public." *Haskell v. Time, Inc.*, 965 F. Supp. 1398, 1406-07 (E.D. Cal. 1997) (citation omitted).

Liability for failure to disclose the presence of lead in the products may not be imposed under § 17500 when California and federal agencies that regulate exposure to lead from the products do not require such disclosure, pursuant to the "safe harbor" doctrine articulated by the Supreme Court in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 182 (1999) (conduct that is affirmatively permitted by the government may not form the basis of a claim of unfair competition under § 17200).

II. RELEVANT CODE SECTIONS

Health & Safety Code § 25249.6 Required warning before exposure to chemicals known to cause cancer or reproductive toxicity

"No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual, except as provided in Section 25249.10."

Health & Safety Code § 25249.7 Enforcement (as effective at the time of the 60-day notices served by Plaintiff)

"(d) Actions pursuant to this section may be brought by any person in the public interest if both of the following requirements are met:

(1) The private action is commenced more than 60 days from the date that the person has given notice of an alleged violation of Section 25249.5 or 25249.6 that is the subject of the private action to the Attorney General and the district attorney, city attorney, or prosecutor in whose jurisdiction the violation is alleged to have occurred, and to the alleged violator.

(2) Neither the Attorney General, any district attorney, any city attorney, nor any prosecutor has commenced and is diligently prosecuting an action against the violation."

Health & Safety Code § 25249.8 List of chemicals known to cause cancer or reproductive toxicity

(a) On or before March 1, 1987, the Governor shall cause to be published a list of those chemicals known to the state to cause cancer or reproductive toxicity within the meaning of this chapter, and he shall cause such list to be revised and republished in light of additional knowledge at least once per year thereafter. Such list shall include at a minimum those substances identified by reference in Labor Code Section 6382(b)(1) and those substances identified additionally by reference in Labor Code Section 6382(d).

(c) On or before January 1, 1989, and at least once per year thereafter, the Governor shall cause to be published a separate list of those chemicals that at the time of publication are required by state or federal law to have been tested for potential to cause cancer or reproductive toxicity but that the state's qualified experts have not found to have been adequately tested as required.

Health & Safety Code § 25249.10 Exemptions from Warning Requirement Section 25249.6 shall not apply to any of the following:

(c) An exposure for which the person responsible can show that the exposure poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer, and that the exposure will have no observable effect assuming exposure at one thousand (1000) times the level in question for substances known to the state to cause reproductive toxicity, based on evidence and standards of comparable scientific validity to the evidence and standards which form the scientific

basis for the listing of such chemical pursuant to subdivision (a) of Section 25249.8. In any action brought to enforce Section 25249.6, the burden of showing that an exposure meets the criteria of this subdivision shall be on the Defendant.

Health & Safety Code § 25249.11 Definitions

For purposes of this chapter:

(c) "Significant amount" means any detectable amount except an amount which would meet the exemption test in subdivision (c) of Section 25249.10 if an individual were exposed to such an amount in drinking water.

(f) "Warning" within the meaning of Section 25249.6 need not be provided separately to each exposed individual and may be provided by general methods such as labels on consumer products, inclusion of notices in mailings to water customers, posting of notices, placing notices in public news media, and the like, provided that the warning accomplished is clear and reasonable. In order to minimize the burden on retail sellers of consumer products including foods, regulations implementing Section 25249.6 shall to the extent practicable place the obligation to provide any warning materials such as labels on the producer or packager rather than on the retail seller, except where the retail seller itself is responsible for introducing a chemical known to the state to cause cancer or reproductive toxicity into the consumer product in question.

Health & Safety Code § 25249.12 Implementation

(a) The Governor shall designate a lead agency and other agencies that may be required to implement this chapter, including this section. Each agency so designated may adopt and modify regulations, standards, and permits as necessary to conform with and implement this chapter and to further its purposes.

Final Statement of Reasons, 22 Cal. Code Regs. § 12601 (clear and reasonable warnings)

The apparent purpose of section 25249.11(f) is to encourage the origination of warning materials such as labels with the persons in the chain of distribution most likely to know the chemical properties of products intended for retail sale to consumers.

"...The Act, however, requires warnings only where there is a knowing and intentional exposure to a listed chemical. Nothing requires that each business conduct a scientific analysis of all its products. Unless a business has reason to know the the (sic.) **product** contains a listed chemical, no testing is needed and no warning is necessary." (FSOR at 32) (emphasis added).

Health & Safety Code § 25249.13. Preservation Of Existing Rights, Obligations, And Penalties.

Nothing in this chapter shall alter or diminish any legal obligation otherwise required in common law or by statute or regulation, and nothing in this chapter shall create or enlarge any defense in any action to enforce such legal obligation. Penalties and sanctions imposed under this chapter shall be in addition to any penalties or sanctions otherwise prescribed by law.

22 Cal. Code Regs. § 12102(n) (former 12201())

"Knowingly" refers only to knowledge of the fact that a discharge of, release of, or exposure to a chemical listed pursuant to Health and Safety Code Section 25249.8(a) is occurring. No knowledge that the discharge, release or exposure is unlawful is required. However, a person in the course of doing business who, through misfortune or accident and without evil design, intention or negligence, commits an act or omits to do something which results in a discharge, release or exposure has not violated Health and Safety Code Sections 25249.5 or 25249.6.

Ballot Argument in Favor of Proposition 65

"Proposition 65's new civil offenses focus only on chemicals that are *known to the state* to cause cancer or reproductive disorders. Chemicals that are only suspect are not included."

"These new laws will not take anyone by surprise. They apply only to businesses that *know* they are putting one of the chemicals out into the environment, and that *know* the chemical is actually on the Governor's list." Ballot Argument in Favor of Proposition 65 (emphasis in original).

Final Statement of Reasons for 22 Cal. Code Regs § 12201(e) (defining expose)

The ballot arguments in support of Proposition 65 specifically describe the knowledge which §§ 25249.5 and 25249.6 require. *Id.* at 21.

22 Cal. Code Regs. § 12102(i) (former 12201(f))

The term "expose" means to ingest, inhale, contact via body surfaces or otherwise come into contact with a chemical. An individual may come into contact with a chemical through water, air, food, consumer products and any other environmental exposure as well as occupational or workplace exposures.

22 Cal. Code Regs § 12801

(a) "The determination of whether a level of exposure to a chemical known to the state to cause reproductive toxicity has no observable effect for purposes of Health and Safety Code Section 25249.10(c) shall be based on evidence and standards of comparable scientific validity to the evidence and standards which form the scientific basis for the listing of a chemical as known to the state to cause reproductive toxicity."

(b) A level of exposure to a listed chemical shall be deemed to have no observable effect, assuming exposure at one thousand times that level, provided that the level is determined.

(1) By means of an assessment that meets the standards described in section 12803 to determine the maximum does level having no observable effect, and dividing that level by one thousand (1,000) to arrive at the maximum allowable dose level; or

(2) By application of a specific regulatory level for the chemical in question as provided in Section 12805.

(c) For purposes of this article, "NOEL" shall mean that no observable effect level, which is the maximum dose level at which a chemical has no observable reproductive effect.

22 Cal. Code Regs § 12821 Level of Exposure to Chemicals Causing Reproductive Toxicity

(b) For purposes of Section 25249.10(c) of the Act, the level of exposure to a chemical listed as causing reproductive toxicity shall be determined by multiplying the level in question (stated in terms of a concentration of a chemical in a given medium) times the reasonably anticipated rate of exposure for an individual to a given medium. The reasonably anticipated rate of exposure shall be based on the pattern and duration of exposure that is relevant to the reproductive effect which provided the basis for the determination that a chemical is known to the state to cause reproductive toxicity. (For example, an exposure of short duration is appropriate for a teratogenic chemical, whereas a chronic or protracted exposure is appropriate for one that retards fetal growth.)

(c) The following assumptions shall be used to calculate the reasonably anticipated rate of exposure to a chemical listed as causing reproductive; toxicity, unless more specific and scientifically appropriate data are available:

(1) The assumptions set forth in subsection (d) of Section 12721 shall be used to calculate the reasonably anticipated rate of exposure to a chemical listed as causing reproductive toxicity, unless more specific and scientifically appropriate data are available.

(2) For exposures to consumer products, the level of; exposure shall be calculated using the reasonably anticipated rate of intake or exposure for average users of the consumer product, and not on a per capita basis for the general population. The rate of intake or exposure shall be based on data for use of a general category or categories of consumer products, such as the United States Department of Agriculture Home Economic Research Report, Foods Commonly Eaten by Individuals: Amount Per Day and Per Eating Occasion, where such data are available.

Final Statement of Reasons for Title 22 of the California Code of Regulations, Chapter 3, Article 8

"Subsection (a) also provides that nothing in Article 8 is intended to preclude the use of evidence, standards, assessment methodologies, principles, assumptions or levels not described in the article to establish that an exposure would have no observable effect.

Therefore, the methodologies, data, principles, assumptions and levels described in the sections following section 12801 are not exclusive and do not prevent a Plaintiff or Defendant in an enforcement action from establishing `no observable effect' by other means. However, such a showing must be based upon data, standards, methodologies, principles and assumptions which are scientifically valid ...."

"'Safe harbor' levels and methodologies deemed to have no observable effect within the meaning of the Act are provided. However, a person is permitted to use any data, standards or assessment methodology, or apply any assumptions or principles desired to show that an exposure would produce no observable effect assuming exposure at one thousand times the level in question. Where a `safe harbor' level or methodology is not used, it remains a question of fact in any enforcement action whether the exposure poses [sic] would produce no observable effect within the meaning of the Act." FSR at 67.

"If a chemical, such as … lead ... was listed under the Act based upon its prior listing as a known human reproductive toxicant within the scope of the federal Hazard Communication Standard (HCS), then the reproductive effects for which it was listed under the Act are the same as the effects which brought it within the scope of the HCS. A more specific understanding of the reproductive effect of concern could be obtained through a review of the federal register to determine the basis for the HCS reference." *Id.* at 74. "Absent studies demonstrating a relationship between different routes of administration and differences in reproductive response by these routes, it is more appropriate to assume that a chemical that produces an an [sic] observable adverse reproductive effect by one route, such as ingestion, is also toxic to reproductive functions by other routes, such as inhalation, and vice versa."

"Absorption studies may reveal that a chemical administered by a particular route will be poorly absorbed. If according to generally accepted principles data obtained from such an exposure route are irrelevant to exposures by other routes, this assumption may yield and a different data set may be more appropriate. However, when scientifically

based interpretations of these data are able to allow predictions of exposure by other routes, the assumption should apply and the data ought to be utilized." FSR at 76.

"The purpose of [section 12805] is to set forth 'no observable effect' levels established for purposes of the Act in order to provide a 'safe harbor' for those who might have difficulty identify such levels if left to their own devices."

"Subsection (b) provides levels for two chemicals known to the state to cause reproductive toxicity: ethylene oxide and lead. Both chemicals are identified by the federal Occupational Safety and Health Administration (OSHA) as known human reproductive toxicants based upon evidence of their effects on humans, and this resulted in their inclusion on the Governor's initial list pursuant to section 25249.8 of the Act." *Id.* at 77.

"Two commentators objected that the 'safe harbor' lead level is based upon inhalation, not ingestion, since the lead PEL which the Agency divided by one thousand is an ambient air standard. These commentators observed that lead absorption into the bloodstream from air inhaled into the lungs approaches 50 percent, while absorption from ingestion is only 10 percent. (See U.S. EPA, Air Quality Criteria For Lead, EPA/600/8-83/-28bf (June 1986).) Therefore, they objected that different levels were not provided for different routes of exposure. (Exh. 6, p. 8; C-40, p. 12.)

"It does not appear necessary to adopt a separate number for each possible route of exposure. If there is scientifically valid absorption data showing that a chemical is absorbed to a lesser extent by one route than another, then a person may utilize that data to show that exposure by the route of poor absorption would produce no observable effect." FSR at 80.

"The exemption test of section 25249.10(c) is based upon exposure. It is the 'exposure' which must produce no observable effect 'at the level in question. Accordingly, [§ 12821(b)] defines 'exposure' for purposes of this exemption to mean the 'reasonably anticipated rate of exposure for an individual to a given medium."

"The reasonably anticipated rate of exposure will vary from case to case.... What rate of exposure is reasonably anticipated from a given medium, such as a certain type of food or a consumer product, will depend upon the medium, its anticipated use and other circumstances."

"The level of exposure which must produce no observable effect assuming exposure at one thousand times the level in question is the product of the concentration of the chemical in the medium and the reasonably anticipated rate of exposure to individuals to that medium." FSR at 83.

"Data on the rate of intake should be based on the data available for general categories of products, such as the U.S. Department of Agriculture Home Economic Research Report on Foods Commonly Eaten by Individuals: Amount Per Day and Amount Per Eating Occasion, where available." FSR at 84.

"On commentator recommended that the regulation provide a means of dealing with variability and fluctuation of the `rate of exposure' term used to calculate the level of exposure, since some persons have a higher rate of exposure than others, though setting the anticipated rate at the highest rate may require a warning to all users of a product on the basis of occasional high use. (C-20, p. 11.) The Agency has attempted to provide a means of dealing with these variables in consumer products. Exposure assessment need only be based upon the reasonably anticipated rate of exposures. To further clarify the Agency's intent, the March 29 proposal provided that it is the reasonably anticipated rate of exposure for 'average' users which must be assessed. Therefore, it appears that this concern has been resolved." FSR at 84-85.

"[A]veraging the exposure or intake to yield a daily exposure over lifetime may not be appropriate for reproductive toxins. Since some reproductive effects, such as teratogenic responses or birth defects, may reflect an acute response during a brief period of intrauterine exposure, exposure to chemicals producing such effects should be assessed on the basis of short term exposure."

"Therefore, when one evaluates such a reproductive toxin, one needs to view the exposure as the one that may cause the acute effect...."

If it is scientifically more appropriate to evaluate a reproductive toxin for chronic toxicity, this section does permit it."

"Under paragraph (c)(3), for long term exposures affecting the developing young, the level of exposure is to be based on the reasonably anticipated rate of exposure for the mother during the nine-month gestation period, since maternal intake would be the means by which the intrauterine exposure would occur. Thus, if the amount of the chemical from a source of exposure during the entire gestation period exceeds one one-thousandth of the level which produces no observable effect. the exemption does not apply, and a warning must be provided." FSR at 85.

Final Statement of Reasons for 22 Cal. Code Regs. § 12903 (standards for 60-day notices):

"Subparagraph (b)(2)(C) specifies that all notices alleging a violation of Health and Safety Code section 25249.6, the warning requirement, identify the route of exposure involved -- i.e., dermal contact, inhalation, or ingestion. Because the human body's ability to absorb different chemicals varies substantially by route of exposure, this is important information in investigating the potential merit of any claim." *Id.* at 9.

Final Statement of Reasons for 22 Cal. Code Regs § 12201(e) (defining expose)

"Under the Act, a business may defend itself by showing that its exposure poses no significant risk, or is at a level which is one one-thousandth of the no observable effect level. One way to make such a showing may be to establish a lack of absorption or effect by the route in question." *Id.* at 29.

22 Cal. Code Regs. § 12903 (60-day notices)

(a) For purposes of Health and Safety Code section 25249.7(d). "notice of the violation which is the subject of the action" (hereinafter "notice" or "sixty-day notice") shall mean a notice meeting all requirements of this section. No person shall commence an action to enforce the provisions of the Act "in the public interest" pursuant to Health

and Safety Code section 25249.7(d) except in compliance with all requirements of this section.

(b) Contents of Notice.

(2) Description of Violation. A notice shall provide adequate information from which to allow the recipient to assess the nature of the alleged violation, as set forth in this paragraph. The provisions of this paragraph shall not be interpreted to require more than reasonably clear information, expressed in terms of common usage and understanding, on each of the indicated topics.

(A) For all notices, the notice shall identify.

3. the approximate time period during which the violation is alleged to have occurred; and

(C) For all notices of violation of Health and Safety Code section 25249.6, the route of exposure by which exposure is alleged to occur (e.g., by inhalation, ingestion, dermal contact);

(D) For notices of violation of Health and Safety Code section 25249.6 involving consumer product exposures, the name of the consumer product or service, or the specific type of consumer product or services, that cause violation, with sufficient specificity to inform the recipients of the nature of the items allegedly sold in violation of the law and to distinguish those products or services from others sold or offered by the alleged violator for which no violation is alleged. The identification of a chemical pursuant to subsection (b)(2)(A)4 must be provided for each product or service identified in the notice.

(4) A notice is not required to contain the following information:

(A) The specific retail outlet or time or date at which any product allegedly violating the Act was purchased;

(B) The level of exposure to the chemical in question;

(C) The specific admissible evidence by which the person providing the notice will attempt to prove the violation;

(D) For products, the UPC number, SKU number, model or design number or stock number or other more specific identification of products;

(E) For geographic areas, the lot, block, or other legal description of the property in question.

Final Statement of Reasons for 22 Cal. Code Regs. § 12903 (standards for 60-day notices):

"Subparagraph (b)(2)(C) specifies that all notices alleging a violation of Health and Safety Code section 25249.6, the warning requirement, identify the route of exposure involved -- i.e., dermal contact, inhalation, or ingestion. Because the human body's ability to absorb different chemicals varies substantially by route of exposure, this is important information in investigating the potential merit of any claim." *Id.* at 9.

DISCUSSIONS OF THE ISSUES

I. PLAINTIFF'S PROOF OF *PROPOSITION 65* "EXPOSURE"

A. "Exposure" Defined

A "consumer products exposure" is defined as an "exposure" that results from a person's acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer good, or any exposure that results from receiving a consumer service. 22 CCR 12601(b). Under Proposition 65, "expose" means "to cause to ingest, inhale, contact via body surfaces or otherwise come into contact with a listed chemical. An individual may come into contact with a listed chemical through water, air, food [or] consumer products...." 22 CCR 12102(i). "[T]he Health and Welfare Agency has broadly defined the term 'expose' to include **all anticipated means** of bringing individuals into **contact** with chemicals. Examples of these means are provided to further clarify that the Act prohibits all means of ***directly bringing individuals into contact*** with chemicals known to the state to cause cancer or reproductive toxicity without clear and reasonable prior warning." *Consumer Cause, Inc. v. Weider Nutrition Internat., Inc.* (2001) 92 Cal.App.4th 363, 368, citing FSOR, 22 CCR at 29 (emphasis added). "'Contact' occurs at

the first point at which the body connects with a chemical from outside the body." *Consumer Cause, Inc. v. Weider Nutrition Internat., Inc.* (2001) 92 Cal.App.4th 363, 369.

Defining contact in this manner also harmonizes the Act with both California and Federal EPA, both of which have defined "exposure" as any chemical contact with the outer boundary of the human body.[15] As such, Plaintiff's burden as to exposure is to show that a listed chemical has contacted the human body, at which point the burden shifts to the Defendant to make any argument that the contact proven by Plaintiff will not exceed the level that requires a warning.

Plaintiff's burden of demonstrating exposure can be satisfied by proof that the listed chemical is "detectable" in the product in question, without even actually detecting it. FSOR 22 CCR §12901(g) at 15. The difference between Plaintiff's burden of showing only that the chemical was "detectable", by any evidence sufficient to carry the burden of proof, and Defendant's burden of actually testing the product for detection, under the testing hierarchy of § 12901, is the policy of the statute in shifting the burden of proving the significance of the *level* of chemical detected to the Defendant. There is no limit on how a Plaintiff proves that a chemical is "detectable" in the medium in question. Indeed, "the fact that a detectable amount of a listed chemical was involved in a[n] ... exposure can be proven by *any evidence sufficient to carry the burden of proof.*" FSOR 22 CCR § 12901, at 15.

Plaintiff also does not need to prove any "level of exposure." Any higher standard of proof for Plaintiff, other than a mere showing the chemical is "detectable", would assign to him, or her, the statutorily mandated burden on Defendants of showing the actual level of the detected chemical is present in "no significant amount". *Mateel v. Gray, supra*, 04 C.D.O.S. 569, Amicus Brief at 9. The statute specifically contemplates that there are many circumstances or situations where Plaintiff's "actual detection" proof of an

[15] California's EPA defines exposure as the "concentrations of contaminants in air, water, food, and soil at the point of contact between the human and the respective medium." (*See*, Trial Ex. VVV, p. 5-1.) The US EPA similarly defines exposure as chemical contact with the imaginary outer boundary of the human body, including skin, eyes, mouth and nose. (*See*, Trial Ex. 106, p. 1-11, 1-13; Trial Ex. 111, p. 16-19.)

exposure may either not be necessary (because there are independent records or other evidence of it) or may not be possible due to the passage of time. *Id.* at 13. Any other interpretation would permit a Defendant who had done no testing itself to dismiss a Plaintiff's scientifically valid evidence because it may not have happened to be the absolute best test method under the statutory hierarchy for Defendants. *Id.*

B. Proof of Exposures by Plaintiff

Plaintiff has demonstrated, by competent scientific evidence, that each of the painted glassware and cosmetic kit products at issue in this case causes an exposure to lead. According to the undisputed testimony of both Drs. Brown and Callahan, an exposure is established by demonstrating the availability of the chemical in the medium in question and a completed exposure pathway from the medium to the consumer in question. A detectable, and detected, concentration of lead was identified in each of the products for which test results were offered into evidence by either a digest test (EPA 3050B), a leach test (ASTM C9279) and/or a wipe test (NIOSH 9100)." The exposure pathway is provided by consideration of human factors evidence, inspection and analysis of the products and consultation with other experts versed in one or both areas.

Though Plaintiff submits his proof of chemical detectability or detection does not need to comply with § 12901, his testing did, in fact, comply. The ASTM C927 Lip & Rim test was created and adopted by the glassware decorating industry and the FDA. (Exh. 100: 1251-1257). The FDA has specifically approved the test ("although *they do not formally regulate lip and rim area leaching*") and the industry has adopted it as their voluntary National compliance standard. (Exh. DDD.) Indeed, the EPA, FDA and CPSC endorse lip/rim as program to "ensure the public is not presented with any significant health risk due to lead and cadmium that may leach". (Exh. DDD, Exh 136.) Of course, J.C. Penney, itself, has adopted the C927 test to determine compliance with the industries voluntary, minimum, National standards. (Exhs. 50, 63, 65, 66, 100:1212, 100:1222, 100:1238, Brown Test.).

The NIOSH 9100 is not only a test generated by the Federal Government (Exh. 197), but one that is adopted and accepted by the EPA and CPSC for identification of lead on surface areas. (Dr. Brown, Exhs. 135, 136). The CPSC utilized wipe testing to assess consumer risk by identifying the amount of lead and other toxins available on a product's surface. CPSC does not specifically require the use of NIOSH 9100, but follows the same basic protocol for securing a wipe sample. (Exhs. 135 and 136). "One stroke of the filter paper [is] equivalent to 1 stroke by a child's hand" (Exh. 135 at 10).

EPA method 3050B is the standard test adopted/accepted by the Federal government to test for the presence of lead in solids. (Test Method, Dougherty Test. 8/11.) Both Dr. Lakin and Dr. Kagel testified as to their familiarity with this method for testing solids, including cosmetics.

Using these methods, Plaintiff demonstrated that there is detectable lead in each of the products he tested. Dr. Brown combined the fact that the test results demonstrated a significant amount of available lead on a painted glass surface, with the fact that a consumer regularly and repeatedly contacts that painted surface, to complete his exposure pathway. Dr. Brown identified extensive consumer contact with lead at the external boundary of the body, including, primarily, the mouth and hands. The pathway of exposure can vary from direct mouth contact with the available lead, to hand contact from using the glass, to hand-to-mouth contact and even to hand to rim of glass and then directly back to mouth. Lead exposure from the normal use of painted glassware, while either eating, smoking or doing a wide variety of different activities is extensive. Typical consumer behavior includes prolonged holding of the glass, rubbing the texture of the raised, painted surface directly, rubbing it indirectly while wiping the moisture from the glass, etc. Available lead has been demonstrated to exist at different levels, both before and after a glass is washed.

The principle of exposure to the cosmetic kits is no different. These kits are sold in such a way that complimentary shades and components will be maintained together and used together. The consumer may become exposed to the lead in the cosmetics during the

application, when the cosmetic comes in contact with the outer boundary of the skin, mouth, nose and eyes. Additionally, the consumer might be exposed to the cosmetic through glands around the eye that act like drains (naso-lacrimal gland), through exposed vascular tissue with a complete absence of a "protective" lipid layer (the conjunctiva or inner eyelid), through direct ingestion from lipstick entering the mouth, from inhalation of any respirable cosmetic product or even from hand to mouth activities after touching any of these areas to which the cosmetic has been applied or smoking, eating, drinking, etc.

In opposition to Plaintiff's argument that its testing of products has established exposure, Defendants have made several counterarguments. First, Defendant argues that since the Plaintiff's testing does not show whether the lead in its product was inorganic, Plaintiff has not established exposure to a listed chemical because the OSHA standard does not include all forms of lead, but excludes organic lead. The Court agrees with Plaintiff that "lead" means all lead compounds. The breakdown of compounds is not specified in the regulation. Moreover, Defendant did no testing and has advanced no evidence showing the products contained organic lead. In addition, Dr. Embree did not offer any scientific testimony whatsoever regarding whether the paint on all of the glassware – even only the two samples h e looked at – contained organic versus inorganic lead or whether it would even make a difference.

Second, Defendant argues that although the test methods utilized by Plaintiff show the products contain lead, they do not show that exposure will result from the reasonable and foreseeable use of the products. Specifically, Defendant argues that the testing methods don't actually show lead was touched, ingested or inhaled because Plaintiff hasn't shown how the lead could escape the "matrix" in which it is contained, i.e. the cosmetics or the paint. Dr. Embree never provided any testimony regarding a 'matrix' nor lead being trapped in paint.

These arguments are not persuasive because as previously noted, in the Court's view, all that needs to be shown to establish exposure is contact with a consumer product containing lead. Moreover, the testing by Plaintiff on the cosmetics showed that the lead

will indeed leave the cosmetics. The testing on the glassware through wipe tests showed lead leached out of the paint. Defendant criticized such testimony saying they are inappropriate, but Defendant has done no testing itself showing that the lead will not leave the "matrix" of the cosmetics or that the lead will not leach out of the paint. In the absence of such evidence, the Court accepts the Plaintiff's evidence.

Defendant also argues that the testimony of Plaintiff's experts does not establish exposure to lead because they did not accurately testify that the cosmetics or glassware didn't cause exposure to lead. Plaintiff's experts only testified it was possible or likely that such exposure occurred. Defendant seems to suggest it would be necessary to have someone ingest the cosmetics or paint and then have the person's blood tested to establish an exposure to lead. The Court disagrees and finds Plaintiff's expert testimony and test results sufficient to establish an exposure to lead. Specifically, Dr. Brown testified that his risk assessment involved determining (1) if the toxin, lead, was in or on the product, (2) if there was an actual exposure pathway from the product of an individual (by looking specifically at (a) how the product is used, (b) what the product is used for, (c) how much of the toxin is on or in the product, (d) and where in or on the product the toxin exists), (3) whether there was a likelihood of the toxin on or in the product actually causing an exposure and (4) whether the exposure is a public health concern. Dr. Brown followed all of these steps for the painted glassware products and Dr. Brown concluded that actual exposure did in fact occur every time someone touched the glassware decorated with lead paint that J.C. Penney sold. In addition, Dr. Embree also provide consumers of J.C. Penney painted glassware were actually exposed to lead by demonstrating the transfer of lead from the decorated glassware to an individual's fingers and even from an individual's fingers back to glass after handling.

II. KNOWING AND INTENTIONAL EXPOSURE TO LEAD

A. Knowing

When a term is not defined within an initiative statute, "'it can be assumed to refer not to any special term of, but rather to a meaning that would be commonly understood by

the electorate.'...To determine the common meaning, a court typically looks to dictionaries." *Consumer Advocacy Group v. Exxon Mobil Corp.*, 104 Cal.App.4th 438, 444 (2002) (quoting *People ex rel. Lungren v. Superior Court (American Standard)*, 14 Cal.4th 294, 301-02 (1996)). "Knowingly" has been defined in the dictionary as "possessing knowledge, Information, or understanding. See Synonyms at Intelligent...Deliberate; conscious: a knowing attempt to defraud." The American Heritage® Dictionary of the English Language, Fourth Edition (Houghton Mifflin Company 2000). Another dictionary defines the term as follows: "With knowledge; in a knowing manner; intelligently; consciously..." Webster's Revised Unabridged Dictionary (1996, 1998).

The ballot arguments in favor of Proposition 65 disclose the intent that the knowledge requirement is one of actual, not constructive, knowledge of the exposure:

> "Proposition 65's new civil offenses focus only on chemicals that are *known to the state* to cause cancer or reproductive disorders. Chemicals that are only suspect are not included.
>
> "These new laws will not take anyone by surprise. They apply only to businesses that *know* they are putting one of the chemicals out into the environment, and that *know* the chemical is actually on the Governor's list." Ballot Argument in Favor of Proposition .65 (emphasis in original).

Under Proposition 65, businesses must provide a "clear and reasonable" warning prior to "knowingly and intentionally" exposing any individual to a listed chemical. 22 Cal. Code Regs. § 12601. "If a person in the course of doing business knows that a listed chemical is present in a product or part of a product, that there is no means of proving that the amount poses no significant risk, then some kind of warning or information is required." FSOR, 22 Cal. Code Regs. § 12601 at 31. Such person need not know that the "exposure" presented a significant risk, "know" the "exposure" was occurring without warning, or "know" that an "exposure" probably would occur. FSOR, 22 CCR § 12201 at 21.

For purposes of Proposition 65, the term "knowingly" refers only to knowledge of the fact that a discharge or, release of, or exposure to a chemical listed pursuant to section

25249.8(a) of the Health & Safety Code is occurring. No knowledge that the discharge, release, or exposure is unlawful is required. 22 Cal. Code Reg. § 12102(n); *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal. App. 4th 454, 463. The knowledge requirement under Proposition 65 is meant to exclude primarily accidental releases or exposures. For example, a person in the course of doing business who, through misfortune or accident and without evil design, intention, or negligence, commits an act or omits to perform an act that results in a discharge, release or, exposure has not violated Health & Safety Code §§ 25249.5 or 25249.6. *See, e.g., Nicole-Wagner v. Deukmejian* (1991) 230 Cal. App. 3d 652, 659 (stating that the phrase "knowingly and intentionally expose" suggests some degree of human activity which results in toxins being added to the environment).

Health and Safety Code § 25249.11(f) states in pertinent pat as follows:

> In order to minimize the burden on retail sellers of consumer products including foods, regulations implementing Section 25249.6 shall to the extent practicable place the obligation to provide any warning materials such as labels on the producer or packager rather than on the retail seller, except where the retail seller itself is responsible for introducing a chemical known to the state to cause cancer or reproductive toxicity into the consumer product in question.

In light of the applicable authorities, knowledge that a notice states there was lead in a specifically identified product does not establish that the retailer has the requisite knowledge that other similar products may contain lead particularly where the retailer makes unsuccessful attempts to determine from the party issuing the notice that other similar products do contain lead and where the retailer has a procedure for requiring its suppliers to advise it appropriately concerning Proposition 65. A retailer who does not know that lead or other listed chemical is contained in a product lacks the requisite knowledge to be required to place a warning on the product under Proposition 65.

1. Macy's West

It was undisputed that, before receiving Plaintiff's 60-day notice, no one at Macy's West had ever heard of lead in cosmetics. Plaintiff did not introduce any evidence to support an inference that the notice itself would have led a retailer in Macy's West's

position to know of lead exposure from products other than Markwins products. Plaintiff asserts that the filing of the lawsuit and the Markwins settlement put Macy's West on notice that other products exposed users to lead, and that Macy's West's "investigation" into Plaintiff's claims was insufficient under the circumstances. However, Plaintiff did not introduce evidence that supported an inference that his nonspecific allegations created constructive knowledge of exposure; much less that it provided actual notice to Macy's West.

Macy's West relies upon the terms and conditions of its Purchase Order, under which each vendor's products are required to comply with all applicable laws, and the vendor is specifically required to provide any required Proposition 65 warnings. Plaintiff contends that Macy's West was unreasonable in relying on the terms of the Purchase Order, primarily because Plaintiff filed an enforcement action after settling with the only manufacturer whose products were identified in the 60-day notice. Even assuming Plaintiff's constructive knowledge theory was sufficient, the facts do not support a finding of constructive knowledge.

Because Plaintiff's counsel declined to identify any "cosmetic kits" other than Markwins, Macy's West sent correspondence to all of its cosmetic vendors (including the vendors whose products were ultimately identified by Plaintiff) to inform them of the litigation, and the fact that Macy's West did not know which products allegedly contained lead and were at issue in the litigation. Macy's West asked the vendors to represent that their products complied with Proposition 65 or, alternatively, to inform Macy's West of those products that were not in compliance. No vendor indicated that its products contained lead or were not compliant with Proposition 65.

Moreover, Plaintiff, a prolific enforcer of Proposition 65,[16] refused to identify any violative products in his original and supplemental discovery responses, leaving Macy's

[16] Plaintiff has served over 650 notices of violation since 1997, and has personally collected tens of thousands of dollars since 2000 as a private enforcer, in addition to the millions of dollars of attorney's fees that have been awarded in his name.

West to guess as to what products it was being sued over. It was not until after Plaintiff specifically identified Fashion Fair products in early 2003 (after the summary judgment motion, and nearly a year after the complaint was filed), that Macy's West obtained test results from that vendor indicating the presence of lead in some of the components of the Beauty on the Go and Glitter `N Go products. The only other cosmetic kit identified by Plaintiff was a single cosmetic kit manufactured by Dior, which was not identified by Plaintiff until shortly before trial.

Plaintiff's reliance upon his settlement with Markwins is unavailing. The express terms of that settlement establish that it is not an admission of anything. Plaintiff did not introduce any evidence that would support an inference that, based on the fact or terms of the settlement, Macy's West should have known anything about any other products. Construing a vendor's settlement that admits no liability or facts as knowledge to a retailer about other products would not only improperly establish liability contrary to Evidence Code § 1152, it would provide a strong disincentive for manufacturers to settle, contrary to the strong policy favoring settlement of disputes. *Neary v. Regents of the University of California*, 3 Cal.4th 273 (1992).

Plaintiff argues that Macy's West should have undertaken more stringent follow-up with its vendors, and the fact that Fashion Fair provided lead test data demonstrates that Macy's West would have learned of the lead content in the cosmetics had it done so. Plaintiff's argument is misplaced. First, constructive knowledge is insufficient to establish liability. Second, other than the specific tests received from Fashion Fair for a product Macy's West had not sold in over a year, Plaintiff s argument posits an inference upon an inference upon an inference: Macy's West could have learned of the presence of lead in the products by asking their vendors or testing the products, which would then put them on notice of the claim that the products expose users to lead, which would then support an inference that they "knew" of that exposure. But, even as to Fashion Fair, the lead testing was not forthcoming until Macy's West wrote to the vendor and specifically informed it that Plaintiff had identified the products as allegedly exposing users to lead.

An inference does not flow from the nonexistence of a fact, and cannot be based upon speculation or conjecture. *Traxler v. Thompson*, 4 Cal.App.3d 278 (1970). An inference upon an inference should be rejected if it is too remote and speculative. *Walton v. Anderson,* 6 Cal.App.3d 1003 (1970); *People v. Warner*, 270 Cal.App. 2d 900 (1969).

Plaintiff cannot bootstrap his charging allegations into constructive knowledge of a substantive element of his claim. The only reasonable inference under the circumstances is that Macy's West's vendors would undertake lead testing and provide requested assistance to Macy's West in order to respond to Plaintiff's allegations, not that Macy's West's actions in attempting to find out what Plaintiff was suing it over somehow meant it was now "knowingly" exposing consumers to lead for every product that Plaintiff ultimately identified in his discovery responses.

This result is compelled by the direction in the initiative to "minimize the burden" on retailers who are not responsible for introducing a listed chemical into a consumer product. Plaintiff's construction of the statute would also lead to absurd results. Under Plaintiff's reasoning, a retailer would always "knowingly" expose individuals to listed chemicals once it receives a 60-day notice, since it must always investigate every potential product that might cause an exposure, even if it is not identified in the notice. While a company that receives a 60-day notice may not simply ignore information before it (such as information pertaining to the very product that is specifically described in the notice), creating a duty to investigate nondescribed products is inconsistent with the plain meaning of the phrase "knowingly and intentionally."

2. J.C. Penney

a. Cosmetics.

The evidence regarding J.C. Penney's knowledge of lead exposure in cosmetics is similar to Macy's West's. It was also undisputed that, before receiving Plaintiff's 60-day notice, no one at J.C. Penney had ever heard of lead in cosmetics. No one at J.C. Penney ever received any lead test results, other than those produced by Plaintiff shortly before

trial. The 60-Day Notice referenced only one product; a product that the vendor assured J.C. Penney did not contain lead.

As with Macy's West, it was also undisputed that J.C. Penney relies upon the terms of its Trading Partner Agreement, which requires that all vendors comply with all laws. Again, Plaintiff asserts that the filing of the lawsuit and the Markwins settlement put J.C. Penney on notice that other products exposed users to lead, and that J.C. Penney's "investigation" into Plaintiff's claims was insufficient under the circumstances.

After receipt of the complaint, on June 12, 2002, and because Plaintiff's counsel declined to identify any "cosmetic kits" other than Markwins J.C. Penney sent correspondence to vendors of the cosmetic products identified in the notice, tendering the defense and indemnity of J.C. Penney for the lawsuit. No vendor indicated that its products did not comply with Proposition 65, or that its products exposed consumers to lead.

As with Macy's West, Plaintiff refused to identify any violative products in his original and supplemental discovery responses, leaving J.C. Penney to guess as to what products it was being sued over. The products that he contended exposed users to lead were not identified by him until after the motion for summary judgment was filed (and some not until April and May 2003), and he produced summary lead testing results for the first time in April, 2003, shortly before trial.

As with Macy's West, Plaintiff has failed to demonstrate that J.C. Penney actually knew that cosmetics exposed users to lead, and has not demonstrated that J.C. Penney had constructive knowledge of such exposure to all of the products that he identified at trial, none of which were identified in the 60-day notice.

b. Glassware

Compliance with the federal lip and rim standard, agreed to by the FDA and the glassware industry, does not qualify for compliance with Proposition 65. The relevance of J.C. Penney's knowledge of the FDA standard is in proving the extent of J.C. Penney's understanding that there is lead in the exterior paint of each of the painted glassware it

sold (with the special exception of the PGM Romania pattern). Proposition 65 is concerned with a consumer product such as painted glassware causing a consumer to come in contact with lead at any point. While J.C. Penney's implementation of an extensive testing program for the FDA lip and rim standards demonstrates their knowledge of lead on the outside of the painted glassware and consequent lead contact, compliance with those FDA standards does not absolve J.C. Penney of its additional Proposition 65 requirements or its "knowledge" that such exposures are occurring.

J.C. Penney knew that human contact with paint in the top 20mm of a glass would cause an exposure to lead and also knew that the same paint below this imaginary 20mm line would cause an exposure on contact. This was known by Mr. Brinkman, Owen Jones, Dianne Carpenter (J.C. Penney legal), Stephen Graves (RTL), Micaela Miramontez (RTL) and Kasey Wise. Specifically, in October of 2001, Mr. Wise informed each of these people that painted glassware allows, "consumers [to] have direct access to the painted surface of the glass and that the paint to which consumers have access contains high levels of lead". (Exh. 52). Mr. Brinkman demonstrated his appreciation for this exposure when, also in October of 2001, he specifically cancelled the Syratech glassware order because he did not want to "expose our customer to lethal materials" even when they were below the external 20mm below the rim area. This discussion arose in the context of 16 CFR 1303 lead paint standards, but regardless of whether their application was removed, J.C. Penney's appreciation of, or "knowledge" of lead exposures occurring below the lip and rim was never removed. Indeed, Mr. Wise notified J.C. Penney employees that "Prop 65 labeling is required for all items containing lead", not just ones with lead in the paint in the lip and rim, but ones with leaded paint where the consumers have direct access. (Exh. 52 – 0067).

Mr. Brinkman and J.C. Penney also had other direct evidence that compliance with the FDA lip and rim had no significance to the requirement to label the Products with a warning under Proposition 65. In the Syratech documents, the discussion prior to cancellation of the order was for J.C. Penney to simply place a Proposition 65 warning

with the product. Discussions with Syratech contained specific suggestions that, "since the product passes FDA requirement and the handpainting is 20 mm below the rim ...you may want to put warning labels on those products that will be shipped to your California stores." (Exh. 52 – 0064). Moreover, J.C. Penney sold the Lennox Butterfly Meadow painted glass with a Proposition 65 warning even though there was no indication that its painted decoration encroached upon the lip and rim. Similarly the Dansk glasses, before reformulation, would have required a warning though they had no paint within the lip. Moreover, despite the fact that all Home Essentials and Beyond and Block/Salton patterns were directed to, and allegedly only did have paint below the lip and rim, Mr. Brinkman testified that these painted glasses were sold or supposed to be sold with a Proposition 65 warning by J.C. Penney. The mere fact that J.C. Penney allegedly told its vendors to keep the paint out of the lip and rim area demonstrates J.C. Penney had a complete understanding that the external paint on its glassware caused exposure to lead on contact. Finally, and most illustrative, is the fact that even the two models of painted glassware directly designed and imported for the J.C. Penney Home Collection brand were sold with a pre-printed Proposition 65 warning on the box despite there having no paint within the lip and rim area.

The Court finds Mr. Brinkman's claim that he believed that the lead in painted glassware was removed by the firing process not credible. Such belief makes no sense in light of his cancellation of the Syratech order because of 58% lead in the paint. Nor does it make sense in light of the fact that Mr. Brinkman was testing all of these products for lead compliance under the FDA standard. Certainly if there was no more lead, no more testing for lead – under any standard – would be required. Moreover, J.C. Penney specifically tested its painted glassware products to verify whether this theory of lead removal in firing was true. Mr. Brinkman, Kelly Chow, Norah Hudson, Micaela Miramontez, Stephen Graves and other J.C. Penney employees were specifically advised, also in October of 2001, that "the RTL has confirmed that the lead limits are the same

after the firing/curing process" and that the fired paint continued to have extremely high lead content. (Exh. 52 – 0065.)

Mr. Brinkman did not rely on Home Essentials & Beyond, Granco, Gibson, Libbey, Certified International or Block/Salton to comply with Proposition 65 by virtue of their trading partner agreement. By Mr. Brinkman's and Mr. Jones' own admission, these vendors were not "exempt" from the J.C. Penney in-house testing programs specifically designed to assure compliance with consumer protection standards. For each of these vendors, and each model of painted glassware supplied to J.C. Penney by them, J.C. Penney specifically obligated itself to perform all of the consumer protection standard testing, including the FDA lip and rim test and the 16 CFR 1303 test. Again, it is not the application of the standard that matters, but the rationale and result thereof. None of these tests would ever have been performed had J.C. Penney known that the painted glassware products did not contain lead. Instead, the tests were repeatedly performed and each time paint on the glassware was analyzed for lead, the results came back positive. J.C. Penney relied on itself for testing painted glassware for consumer safety compliance for lead exposures. From the time J.C. Penney started the painted glassware program with Syratech glassware, these tests repeatedly provided J.C. Penney with the "knowledge" that lead was in the paint and consumers had direct exposure access to that lead.

To "knowingly" expose a consumer to lead, J.C. Penney only need know that they are putting the chemical out there and that it is on the governor's list. FSOR for 22 CCR § 12201 at 21. In direct contrast to J.C. Penney's argument, they don't even have "knowledge that the discharge, release or exposure is unlawful." 22 CCR § 12102(n). Moreover, a "knowing exposure" does not require proof of knowledge that (1) the "exposure" in question presents a significant risk to the consumer, (2) the "exposure" was occurring without warning, or even (3) that the "exposure" probably would occur. FSOR for 22 CCR § 12201 at 21. Under evidence in this case, J.C. Penney knowingly exposed consumers to lead from the first sale of Home Essentials and Beyond painted glassware and through the sale of other glassware proven to be painted with lead containing paint

sold at J.C. Penney stores. In addition, the glassware products, that were proven to demonstrate detectable and detected lead are consumer products that were actually purchased from J.C. Penney stores in the same manner as an ordinary consumer would have purchased them.

It should be specifically noted that Defendant did not produce any evidence of any lead contamination of any of the glassware products between their removal from J.C. Penney stores and their testing at the Curtis & Tompkins lab. Dr. Brown specifically testified that the variation and range of test results was direct evidence of a lack of lead from contamination (which would present as uniform levels on the glassware surface). (Brown 8/7/03 trial testimony.) Further proof that lead was coming from the paint on the glassware and not any contamination was presented through Dr. Brown's testimony about the ability of a monolayer of moisture on the surface of glassware to turn into carbonic acid through the evaporative process and, in turn, accelerate the rate of lead leaching from the glassware surface. Dr. Brown's experience with this phenomenon was duplicated by Curtis & Tompkins testing that washed, wiped, waited and then wiped again different painted glassware samples. This test demonstrated the continuing, and even accelerated leaching of lead to the surface of J.C. Penney painted glassware, just from sitting in ambient room air. (Dr. Brown 8/7/03 trial testimony, Exs. 146.)

B. Intentional

The Court interprets the word "intentionally" in the Health and Safety Code § 25249.6 to mean that the activity which results in the exposure are activities that are not accidental. This Court finds persuasive authority in non Proposition 65 cases which hold it is not necessary to act "with the specific intent, purpose or design" to cause the actual injury complained of. *See Korea Supply, supra,* 29 Cal.4th at 1156-1157, *accord,* 1-800 *Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 586. Application of this precedent to the case before us means Defendant need not have had any specific intent to expose consumers to a toxic chemical, only that their intended actions of selling a product containing such chemicals is intentional activity within the meaning of the statute. In the

case of cosmetics, there is no liability, because Macy's West and J.C. Penney did not act with knowledge that the cosmetics contained lead.

III. STANDING

A. 22 CCR § 12903 Mandates That 60-Day Notices Including Some Description of a Consumer Product Type or Category Will Cause All Reasonably Inferred Variations of Such Type or Category to Be Included in the Scope of the Notice.

Proposition 65 allows private persons, such as Mr. DiPirro, to file a civil action to enforce its provisions if such person gives "notice of the violation which is the subject of the action" and sixty days pass without the Attorney General or City/District Attorney commencing an action upon that Notice. (Exh. 203, FSOR 22 CCR § 12903 at 2.) To provide such "notice of the violation which is the subject of the action", the violation must be described in the Notice "in some way". (Exh. 203, FSOR 22 CCR § 12903 at 2.)

For consumer products, the notice must include "the name of the consumer product or service, or the *specific type of consumer product* or services that cause the violation, with sufficient specificity to inform the recipients of the nature of the items allegedly sold in violation of the law and to distinguish those products or services from others sold or offered by the alleged violator for which no violation is alleged." 22 CCR §12903(b)(2)(D) (emphasis added).

To avoid substantial controversies over the scope of the standing created by the Notice description of the violation, OEHHA adopted and explained 22 CCR § 12903. (Exh. 203, FSOR 22 CCR § 12903 at 2, 3.) OEHHA established description of violation requirements "to ensure that notices provide adequate information necessary for the recipients to evaluate the nature and scope of the alleged violation". However, OEHHA also specifically cautioned that "[t]he provisions of [§12903] **shall not** be interpreted to require more than reasonably clear information, expressed in terms of common usage and understanding". (Exh. 203, FSOR 22 CCR § 12903 at 8 (emphasis added)) Indeed, in the specific context of the scope of a Notice of Violation, OEHHA further acknowledged its

intent that such scope not be unreasonably limited, but include all those types of violations that "one would reasonably infer from the notice." (Exh. 203, FSOR 22 CCR § 12903 at 8.)

This approach is consistent with the overall purpose of Proposition 65. "Proposition 65 [is] a remedial statute intended to protect the public... [and it must be construed] broadly to accomplish that protective purpose." *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 314. Accordingly, the notice requirements should not be given an overly restrictive interpretation. *Amador Valley Joint Union High School Dist. v. State Board of Equalization* (1978) 22 Cal.3d 208, 245-246. OEHHA recognizes that the protection of the public health and the environment is so fundamental to the statute that it has designed this level of Notice description to not only to halt existing violations and produce ultimate compliance by Defendants, but designed to do so quickly. (Exh. 203, FSOR 22 CCR § 12903 at 11.) By necessity, the notice requirements in § 12903 delineate the level of detailed information in a 60-Day Notice that is sufficient to "assure that such notices actually further [these] purposes." (Exh. 203, FSOR 22 CCR §12903 at 4.)

B. A Notice Describing a Type or Category of Products Provides Notice and Standing to Sue for All Consumer Products of That Type Without Requiring Any Further Specificity That Might Unnecessarily Exclude a Model or Version of Such Product or Category.

OEHHA recognized that identification of the product at issue from a Notice "has been one of the most problematic in evaluating notices." (Exh. 203, FSOR 22 CCR § 12903 at 10.) For this reason, OEHHA went to great lengths explaining the rule that a sufficient product description only need identify the product type or category and nothing further. (Exh. 203, FSOR 22 CCR § 12903 at 10.)

OEHHA begins its entire discourse on the difference between a valid product description and one that is too broad by offering that "ceramic dishes" or "spray paint" are each an adequate and valid product *type* description. (Exh. 203, FSOR 22 CCR § 12903